

This is a claim for an August 24, 2007 accident and alleged physical and psychological injuries. In the December 16, 2009 Award, ALJ Hursh found the record did not show claimant sustained a psychological injury that was directly traceable to the work-related physical injuries and, therefore, claimant's disability benefits were limited to

those for his physical injuries. Further, the ALJ denied benefits for a permanent total disability and a work disability.¹ After averaging a 3 percent whole body functional impairment rating (5 percent with 2 percent preexisting) provided by Dr. Eden Wheeler and a 10 percent whole body functional impairment rating provided by Dr. P. Brent Koprivica, ALJ Hursh determined claimant sustained a 6.5 percent whole body functional impairment due to his physical injuries. The ALJ granted claimant permanent disability benefits based upon the 6.5 percent whole body functional impairment.

Claimant contends he sustained a psychological injury that is directly traceable to the physical injuries he suffered on August 24, 2007. Claimant requests the Board to reassess the extent of his permanent impairment in consideration of the psychological injury. Claimant maintains he is practically and realistically unemployable and asks the Board to grant him benefits for a permanent total disability. In the alternative, claimant asserts he has a 100 percent wage loss and that testimony from Dr. P. Brent Koprivica supports a 100 percent task loss.

Respondent contends claimant's psychological diagnosis is not directly traceable to his August 2007 injuries. Respondent asserts work disability is not applicable in this instance as claimant's wage loss is not an effect of the work injury and, further, "if the injury didn't cause the psychological pathology, and the injured worker refuses to treat the pathology, then the employer certainly shouldn't have to shoulder the economic burden of that pathology."²

The issues before the Board on this appeal are:

1. Whether claimant's psychological condition is directly traceable to his August 24, 2007 work-related injury.
2. What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

¹ A permanent partial general disability under K.S.A. 44-510e.

² Respondent's Brief at 2 (filed Feb. 22, 2010).

Claimant was employed as a commercial van salesman, which included delivering vehicles, for the respondent. He had worked for the respondent six years before his work-related accident on August 24, 2007. The accident occurred when claimant was returning to the sales area from the parts department of respondent's office. He slipped in diesel fuel and hit his right arm on a counter and then came down directly on his right arm and right hip. Claimant experienced no immediate symptoms besides a small laceration on his right arm and being "stunned." He tried working for the remaining portion of his shift and then drove home. During the drive home the claimant had to stop three times and get out of his car and walk around due to the severe pain that he was experiencing. The pain was coming from his hip, right arm and traveled up his spine to his temple area.³

On the evening of August 24, 2007, claimant started to experience tremors in his right arm. Claimant, who is right-hand dominant, had no history of tremors in his right arm before August 24, 2007. The next morning, claimant continued to experience pain in his neck, lower back and hip in addition to tremors in his right arm.⁴ Due to the severity of the pain, claimant's wife took him to St. Luke's Northland Hospital emergency room to be examined and treated. After x-rays were taken and proved negative, claimant was released and advised to contact his personal physician, Dr. Carl M. Myers.⁵ Dr. Myers saw claimant on August 28, 2007, and claimant kept an appointment with Dr. Jeffrey A. Bredemann on August 29, 2007, for an epidural injection, which had already been scheduled due to a non-work-related accident of July 6, 2007.

Claimant received two epidural injections in August 2007 before the August 24, 2007 accident to treat injuries sustained in a vacation accident on July 6, 2007. The injuries occurred when claimant fell getting out of an upper bunk in a motor home, resulting in five fractured ribs as well as neck, right shoulder, right arm and rib pain. He was treated through his personal physician, Dr. Myers, and underwent x-rays and an MRI showing some degenerative changes of the cervical spine. Claimant was referred to Dr. Bredemann for three cervical epidural injections. He received the first two injections on August 9 and 16, 2007. Claimant appeared for his third epidural injection on August 29, 2007, but declined the procedure because of pain and because he did not feel as if the injections were helping.⁶

³ P.H. Trans. at 11.

⁴ *Id.*, at 11, 12.

⁵ *Id.*, at 15, 16.

⁶ *Id.*, Resp. Ex. A.

After the August 24, 2007 accident, the claimant continued working for the respondent from his home. The arrangement continued until respondent advised claimant he would not get paid unless he worked from the office.⁷ Respondent informed claimant he would be terminated unless he returned to work. Claimant returned to work on January 3 and 4, 2008. Claimant's home was 52 miles from the office. Claimant, who did not feel capable of driving because of pain, was driven to his office by his brother.⁸ Due to the pain caused by traveling in a vehicle, claimant sought treatment from Dr. Myers. On January 7, 2008, Dr. Russell S. Yocum (who was in the same medical clinic as Dr. Myers) restricted claimant from driving and from riding in a vehicle for distances more than 20 miles.⁹ Claimant does not feel safe driving because of his delayed perceptions and reactions. He describes that to be feeling as if he is driving drunk.¹⁰ Claimant has not driven a vehicle since late 2007.¹¹

Claimant did not return to work after January 4, 2008. In mid-January 2008 respondent informed claimant that he had resigned from his position; hence, he was terminated.

Dr. Eden Wheeler, at the request of respondent and its insurance carrier, examined and evaluated claimant on September 25, 2007, and January 10, 2008. Dr. Wheeler opined that only claimant's lumbar spine pain was causally related to the work accident. Additionally, she opined that maximum medical improvement status had been achieved and claimant was appropriate for release from care to normal duties.¹² Dr. Wheeler rated the lumbar spine as a 5 percent whole person impairment with a 2 percent preexisting impairment, resulting in a 3 percent whole person impairment.¹³

Dr. P. Brent Koprivica examined and evaluated claimant at the request of claimant's attorney on December 21, 2007. In his opinion, claimant suffered injury with an increase in cervical pain and right cervical radicularlike complaints and injury in the lumbar region with the development of chronic mechanical low back pain as a result of his work-related

⁷ *Id.*, at 18.

⁸ R.H. Trans. at 13.

⁹ P.H. Trans., Cl. Ex. 3.

¹⁰ R.H. Trans. at 11.

¹¹ P.H. Trans. at 24; Becker Depo. at 12.

¹² Wheeler Depo., Resp. Ex. B.

¹³ *Id.*, at 24.

accident of August 24, 2007. Dr. Koprivica suspected a psychogenic component to claimant's right arm tremors. Consequently, he recommended a formal psychiatric evaluation.¹⁴

Dr. Stanley Butts, a licensed psychologist, evaluated claimant on June 5, 2008, and July 31, 2008.¹⁵ Dr. Butts noted that claimant had been receiving Ativan, an anti-anxiety medication, for a number of years prior to his work-related accident. Testing administered by Dr. Butts indicated that the claimant had a longstanding discomfort with others, a fear of failure and fear of disapproval from others. Further, claimant was easily hurt and tended to keep others at a distance due to his expectation of rejection. In addition, Dr. Butts opined that claimant's job involving sales was a job claimant was not well suited for due to his discomfort with others and his fear of rejection, thus causing claimant anxiety.¹⁶ The claimant's McGill pain rating index was 39, which indicated a high degree of perceived suffering. Testing administered by Dr. Butts indicated that claimant was not a malingerer.¹⁷

Dr. Butts opined there was a secondary gain from the tremors that claimant was experiencing but thought the secondary gain was not from a conscious attempt to obtain financial award but, rather, came from a need to escape a highly anxiety-provoking situation. Dr. Butts indicated that at the same time, there was no awareness by claimant of this aspect of his disorder and, in fact, Dr. Butts would expect claimant to deny it and be angered by such a suggestion.

Additionally, Dr. Butts stated:

It is my opinion that the patient unconsciously tenses the muscles of his arm and sometimes his legs to an extreme degree and maintains them strongly tensed. Such prolonged, very strong tensing causes the tremors much as a weight lifter, having reached his extreme at the amount of weight he is able to lift, will start trembling. When the patient concentrates on not shaking, such as when he is wiping down his face with his hands, or passing through a doorway and wanting to avoid hitting the doorway, the shaking briefly decreases. Also, distraction could cause some brief decrease in trembling. Further, anxiety increases the trembling, such as when he is being examined by a doctor whom he sees as hostile to his

¹⁴ Koprivica Depo., Ex. 2 at 17.

¹⁵ The Board notes the report of Dr. Butts that is Respondent's Exhibit A with the regular hearing transcript and the report of Dr. Butts that is Exhibit 5 with Dr. Koprivica's deposition are somewhat different although they are dated the same.

¹⁶ Koprivica Depo., Ex. 5 at 6.

¹⁷ *Id.*, Ex. 5 at 5, 6.

case. . . . The tensing of the arm is so extreme over a prolonged time that it causes the trembling. Of course, all this is unconscious, just as our own tenseness is usually unconscious when we are anxious and experience pain.¹⁸

Dr. Butts' diagnosis was conversion disorder and generalized anxiety disorder. According to Dr. Koprivica, a conversion disorder is the manifestation of a neurologic deficit that is psychologically based, not physical. In Dr. Butts' opinion claimant's condition is a permanent impairment resulting primarily from the August 2007 work injury. Using the second edition of the *AMA Guides*,¹⁹ Dr. Butts rated claimant as having a 45 percent whole person impairment. Further, Dr. Butts considered claimant to be permanently and totally disabled taking into account claimant's strong belief that it is dangerous for him to drive and the impairments regarding his arm and his chronic lumbar pain suffered in the slip and fall.

After reviewing the psychological evaluation report of Dr. Butts, Dr. Koprivica supplemented his December 2007 report with a letter addendum dated November 26, 2008. In that letter, Dr. Koprivica considered Dr. Butts' assessment, diagnosis and rating related to claimant's psychological condition. In reaching his conclusions regarding impairment, for the psychological contribution Dr. Koprivica deferred to Dr. Butts' opinions. Dr. Koprivica opined that the conversion disorder was caused by the work-related accident and that the anxiety disorder was aggravated by the accident.²⁰ Dr. Koprivica further opined that separate from the psychological injuries claimant had soft tissue neck and back pain associated with the work-related injury. Using the fourth edition of the *AMA Guides*, Dr. Koprivica assigned claimant's neck injury a 5 percent whole person impairment and he assigned a 5 percent whole person impairment for the low back. Combining these impairments with Dr. Butts' 45 percent whole person impairment, Dr. Koprivica assigned a 50 percent whole person impairment to the claimant.

Finally, Dr. Koprivica opined that due to claimant's psychological condition claimant was not able to access the open labor market. Dr. Koprivica further opined that if claimant had sustained only physical injuries from the work-related accident he would be able to work with restrictions. Dr. Koprivica opined it was not safe for claimant to drive.²¹ In considering vocational expert Michael J. Dreiling's task list and considering only restrictions for claimant's physical injuries, Dr. Koprivica determined that claimant could not perform 6 of the 12 tasks identified by Mr. Dreiling. Dr. Koprivica, when combining both the

¹⁸ *Id.*, Ex. 5 at 6, 7.

¹⁹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

²⁰ Koprivica Depo. at 37, 52.

²¹ *Id.*, at 22.

physical injuries and the psychological impairment, determined that the claimant could not access the open labor market.

Two vocational specialists evaluated the claimant's vocational capabilities – Terry L. Cordray at the request of the respondent and Michael J. Dreiling at the request of the claimant. Mr. Cordray identified 17 tasks and opined that based upon his physical limitations claimant could return to work and earn his previous wage.²² Mr. Cordray also opined that based on claimant's functioning in the mild to moderate impairment level as noted by Dr. Butts, claimant would retain the capacity to perform his previous job.²³ Mr. Dreiling found 12 tasks and opined that when considering only claimant's physical injuries, claimant should be able to return to his past work and work in the labor market.²⁴ When considering claimant's physical restrictions and his psychological condition, however, Mr. Dreiling opined claimant would not be employable in the open labor market.²⁵

Dr. Rosalyn E. Inniss, a psychiatrist, examined claimant at the request of respondent and its insurance carrier on May 7 and 12, 2009. Dr. Inniss' diagnoses included an anxiety disorder that predated claimant's work-related injuries, conversion disorder versus hysterical personality disorder, and psychogenic tremor of the right upper extremity. Dr. Inniss explained the difference between conversion disorder and hysterical personality disorder:

Q. (Mr. O'Connor) What is the difference between those two entities from a professional psychiatric standpoint? I'm talking about conversion disorder and hysterical personality disorder.

A. (Dr. Inniss) You can be hysterical without having physical symptoms. There's the flamboyant, dramatic person where it's never a paper cut but it's almost an amputation, where nothing is reacted to in a small way.

The conversion disorder usually refers to a physical symptom that has a psychological basis and cannot be physiologically or anatomically explained, such as hysterical blindness or paralysis. In this case it's a tremor that is non-physiological in nature and has an emotional component as far as its presentation.²⁶

²² Cordray Depo. at 8, 9.

²³ *Id.*, at 11.

²⁴ Dreiling Depo. at 10, 11.

²⁵ *Id.*, at 11, 12.

²⁶ Inniss Depo. at 32, 33.

Dr. Inniss testified that it was possible that claimant was suffering from a conversion disorder.²⁷ Further, Dr. Inniss' July 8, 2009 report states: "I would be more inclined to look at Hysterical Personality Disorder before the Conversion Disorder but on testing I am not sure if it is not a judgment call."²⁸

In Dr. Inniss' opinion, the claimant's diagnosis of hysterical personality disorder was not caused by the August 2007 work injury but, rather, the injury opened the door for the symptoms to come through and for the claimant to be given the diagnosis.²⁹

Dr. Inniss opined claimant is not a malingerer in the usual sense but there is a secondary gain above and beyond the monetary issue. The secondary gain is his inability to work and not have to deal with social discomfort. Finally, Dr. Inniss testified that claimant's psychiatric condition probably should be considered disabling, either in whole or in part.³⁰

Claimant testified that he has not worked anywhere since January 2008.³¹ Claimant indicated he was not able to work because of the severity of his pain and inability to drive.

When he testified at the March 2009 regular hearing, claimant had applied for and was receiving Social Security disability benefits. Claimant indicated he was receiving those benefits as a result of the August 24, 2007 work accident.³²

Psychological injuries

'In order to establish a compensable claim for traumatic neurosis under the Kansas Workers Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.' *Love v.*

²⁷ *Id.*, at 37.

²⁸ *Id.*, Ex. B at 20.

²⁹ *Id.*, at 29.

³⁰ *Id.*, at 43.

³¹ R.H. Trans. at 14.

³² *Id.*, at 14, 15.

McDonald's Restaurant, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).³³

Based on the testimony of the claimant and Dr. Inniss, Dr. Koprivica and the report of Dr. Butts, the Board finds claimant's psychological condition is compensable. It is uncontroverted that claimant sustained a work-related injury. And claimant's symptoms of a psychological condition are well documented in Dr. Butts' and Dr. Inniss' reports. The remaining question is whether the psychological condition is directly traceable to the physical injury. Dr. Butts opined the psychological condition is related to the August 24, 2007 injury. Dr. Inniss opined the August 24, 2007 injury triggered and/or opened the door for the psychological condition's symptoms to come through. Before August 24, 2007, claimant had never seen a psychologist or a psychiatrist nor been diagnosed with conversion disorder or hysterical personality disorder. The Board is persuaded that the claimant's psychological condition is directly traceable to the work-related physical injuries claimant sustained on August 24, 2007.

Extent of disability

To determine the extent of claimant's disability, the combined effect of claimant's physical injuries and psychological impairment must be considered together. When considering both the physical injuries and the psychological impairment, Dr. Koprivica and Mr. Dreiling both concluded claimant would not be employable in the open labor market. Dr. Butts opined that claimant suffered a permanent condition. Dr. Inniss indicated it is probable that claimant is wholly or partially disabled when considering the psychological impairment. She also opined that her prognosis for claimant is guarded because she is uncertain his psychological symptoms will resolve.

Dr. Wheeler opined that claimant was appropriate for release from care to normal duties. Dr. Wheeler based her opinion on claimant's physical injury only. As such, Dr. Wheeler's opinion is not persuasive. As indicated above, the Board is more persuaded by the testimony of Dr. Inniss, Dr. Koprivica and the report of Dr. Butts that in addition to his physical injuries claimant suffers from a psychological condition that is an impediment to his ability to perform gainful employment.

Consequently, claimant is entitled to receive permanent total disability benefits under K.S.A. 44-510c. And should claimant's condition improve, the parties may request review and modification.³⁴

³³ *Gleason v. Samaritan Home*, 260 Kan. 970, 977, 926 P.2d 1349 (1996).

³⁴ See K.S.A. 44-528.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the ALJ's Award is modified. The Board hereby concludes that the claimant sustained both physical and psychological work-related injuries that have rendered him permanently and totally disabled.

Edwin J. Becker, Jr., is granted compensation from K C Freightliner Sales, Inc., and its insurance carrier for an August 24, 2007, accident and the resulting disability. Based upon an average weekly wage of \$831.41, Mr. Becker is entitled to receive 18 weeks of temporary total disability benefits at \$510 per week, or \$9,180, plus 227.10 weeks of permanent total disability benefits at \$510 per week, or \$115,820, for a permanent total disability and a total award not to exceed \$125,000.

As of April 30, 2010, Mr. Becker is entitled to receive 18 weeks of temporary total disability benefits at \$510 per week, or \$9,180, plus 122 weeks of permanent total disability compensation at \$510 per week in the sum of \$62,220 for a total due and owing of \$71,400, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$53,600 shall be paid at \$510 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

³⁵ K.S.A. 2009 Supp. 44-555c(k).

Dated this ____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Caleb M. Kirwan, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge